STATUTES: THE MISCHIEVOUS LITERAL GOLDEN RULE

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All lawyers are familiar with the three alleged rules of interpretation, as laid down in *Heydon's Case*[1] (the mischief rule), the *Sussex Peerage Case*[2] (the literal rule) and *Grey* v. *Pearson*[3] (the golden rule).

After struggling with these so-called rules for many years, I finally came to the conclusion that, although they might have been separate and distinct "rules" at one time, they have now been fused into one, which I have expressed as follows:[4]

> The words of an Act are to be read in their entire context in their grammatical and ordinary sense (1) harmoniously (2) with the scheme of the Act, the object of the Act (3) and the intention of Parliament (4).
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> (1) *Sussex Peerage* and *Grey* v. *Pearson*
> (2) *Grey* v. *Pearson*
> (3) *Heydon's Case*
> (4) *Heydon's Case, Sussex Peerage* and *Grey* v. *Pearson*.

When I was teaching statutory construction at the Faculty of Law, Ottawa University, I began the first hour of the course with this sentence; then I spent the rest of the term explaining what it meant. The essence of my lectures, and of my text,[5] was that initially words are to be given their literal meaning unless that would lead to some disharmony, in which case the literal meaning might be departed from by giving the words a special, restricted or enlarged meaning or by adopting a less normal but permissible grammatical structure.

I now ask myself, what is a literal meaning? I now believe that the adoption of a secondary meaning is not a departure from the literal meaning; the secondary meaning is the literal meaning in the context in which the words are used. I have come to the conclusion that, except where a mistake is corrected or a meaning is given to senseless words, there is no such thing as a literal meaning as distinguished from some other meaning.

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[1] (1584), 3 Co. Rep. 7a, 76 E.R. 637.

[2] (1844), 11 Cl. & F. 85, 8 E.R. 1034.

[3] (1857), 6 H.L.C. 61, 10 E.R. 1216.

[4] Construction of Statutes (1974), p. 67.

[5] *Op. cit., ibid.*

Thus, if the question is whether a word should be given its full unrestricted meaning or a restricted meaning, and the context dictates a restricted meaning, then the restricted meaning is the literal meaning.[6] If a sentence is ambiguous, there are two literal meanings, and the one chosen according to proper methods of construction is the literal meaning in the statute. If there is a conflict between two provisions and it is reconciled by giving a word a special meaning,[7] by adopting a permissible grammatical structure other than the perhaps more normal one,[8] by reading a special provision as an exception to a general provision or by subtracting the subject matter of one section out of another, the meaning found is the literal meaning.[9] Where a conflict between two statutes is resolved by the application of the principle *leges posteriores priores contrarias abrogant*, or *generalia specialibus non derogant,* there is really not a modification of the grammatical and ordinary sense of the words of the statute; the grammatical and ordinary sense is the sense found after the conflict has been resolved.[10] These processes are not departures from the literal meaning; they are the steps taken to find the literal meaning.

Situations where there is an actual departure from the literal meaning I have found to be rather rare, but they do occur. Thus, in *Fleming* v. *Luxton*,[11] the court read ten as meaning forty; and in *Queen* v. *Wilcock*,[12] the court read "thirteen" George III as meaning "seventeen" George III. And there can also be said to be a departure from the "literal" meaning where words are ignored or changed or errors are corrected.[13] If a section is so garbled as to convey no

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[6] *D.P.P.* v. *Schildkamp*, [1971] A.C. 1, [1969] 2 All E.R. 1640.

[7] *Ottawa* v. *Hunter* (1900), 31 S.C.R. 7.

[8] *Caledonian Railway Company* v. *North British Railway Company* (1881), 6 A.C. 114.

[9] *Re Assessment Equalization Act* (1963), 44 W.W.R. 604; *Pretty* v. *Solly* (1859), 26 Beav. 606; *R.* v. *Township of North York* (1965), 50 D.L.R. (2d) 31.

[10] *Churchwardens of West Ham* v. *Fourth City Mutual Building Society*, [1892] 1 Q.B. 654; *Ex parte Byrne* (1874), 15 N.B.R. 125; *Seward* v. *Vera Cruz* (1884), 10 A.C. 59; *Re Steil's Prohibition Application* (1964), 49 W.W.R. 371; *R.* v. *Faulkner and McIntosh* (1958), 24 W.W.R. 524; *Bailey* v. *Vancouver* (1894), 4 B.C.R. 433; *Gladysz* v. *Gross*, [1945] 2 W.W.R. 266; *R.* v. *Greening Industries Ltd.* [1968] 1 O.R. 759; *R.* v. *Deckert*, [1958] O.W.N. 163; *City of Ottawa* v. *Eastview*, [1941] S.C.R. 448.

[11] (1968), 63 W.W.R. 522.

[12] (1845), 7 Q.B. 317.

[13] *Reference re Alberta Bills*, [1938] S.C.R. 100; *In re Sally Tavens* (1942), 24 C.B.R. and the cases there cited; *Sale* v. *Wills*, [1972] 1 W.W.R. 138; *Wynn* v. *Skegness*, [1967] 1 W.L.R. 52; *The Queen* v. *McLaughlin*, [1855] N.B.R. 159; *Morris* v. *Structural Steel*, [1917] 2 W.W.R. 749; *Re Seizures Act* (1955), 16 W.W.R. 283; *R.* v. *Donald B. Allen Ltd* (1975), 11 O.R. (2d) 271.

meaning at all, then in giving it a meaning there is a departure, not from a literal "meaning", but from the words of the statute.[14]

I have also second thoughts about Lord Wensleydale's remarks in *Grey* v. *Pearson*, where he said:[15]

> I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

As explained in my text,[16] I came to the conclusion that Lord Wensleydale had in mind only an objective absurdity and not a subjective one. There is not an absurdity within his rule if a statute is considered by the reader to be unfair, harsh, unreasonable, inconvenient or unjust; but there may be said to be absurdity if a provision is repugnant to some other provision in the same or another Act; senseless; incongruous; illogical; unworkable. To put it in homely language, a provision is not absurd merely because one thinks so; it is if the "absurdity" is there for everyone to see.

In my text I suggested that Lord Wensleydale meant:[17]

> . . . the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity *in relation to*, or some repugnance *to* or inconsistency *with*, the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, *repugnance or* inconsistency, but no farther.

As indicated here earlier, however, that is not my "rule". Taking Lord Wensleydale's rule as so clarified it is too narrow. The absurdity, repugnance or inconsistency need not be in the rest of the instrument. It could be between two statutes,[18] between a statute and its clear object as found by the courts[19] or even between the statute and the common law.[20] When judges and lawyers speak of the golden rule they have in mind the last part of Lord Wensleydale's sentence. I think it is a misnomer to call that the golden rule. There is no "gold" in the "unless" clause; the "gold" is in the part before that, and those

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[14] *Salmon* v. *Duncombe* (1886), 11 A.C. 627; *R.* v. *Vasey and Lally*, [1905] 2 K.B. 748.

[15] *Supra*, footnote 3, at p. 1234 (E.R.)

[16] *Op. cit.*, footnote 4, pp. 29-35.

[17] *Ibid.*

[18] *Sidmay Ltd* v. *Wehtham Investments*, [1967] 1 O.R. 508; on appeal (1968), 69 D.L.R. (2d) 336; *Ex parte Byrne* (1874), 15 N.B.R. 125.

[19] *Caledonian Railway Company* v. *North British Railway*, *supra*, footnote 8.

[20] *Salmon* v. *Duncombe* (1886), 11 A.C. 627.

words are to the same effect as the words of Tindal C.J. in the *Sussex Peerage Case*, where he said:[21]

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

However, that eminent writer and scholar, Sir Rupert Cross, disagrees with my reformulation of Lord Wensleydale's rule.[22] I doubt that there is any difference of opinion between us. He poses the question "Does the word 'absurdity' as used in various statements of the golden rule mean something wider than repugnance or inconsistency with the rest of the instrument?"[23] He says the answer is in the affirmative. I agree. In reformulating Lord Wensleydale's rule I was merely saying what I thought he meant; but his words as reformulated by me, as I have indicated, do not express what I consider to be the "rule".

Our apparent disagreement appears to me to be purely semantic. He considers that words like "repugnance", "inconsistency", "absurdity", "anomaly" and "contradiction" are, for the purposes of brief exposition propery subsumed under the word "absurdity".[24] Depending on what the writer or speaker has in mind, I agree. The word "absurd" has many meanings. If, as I have indicated, it is used to mean unfair, harsh, unreasonable, inconvenient or unjust, I would say that is a subjective absurdity; thus, I could say that the capital gains tax is absurd, but that feeling does not justify a departure from or a modification of the words of the statute. On the other hand, if there is a repugnance, incongruity or inconsistency within the statute or between two statutes or if one reading of the statute makes it sterile or unworkable, then a modification of the language of the statute or of its grammatical structure may be made to give effect to the obvious intention of Parliament, if the words of the statute are reasonably capable of supporting that construction. I call that objective absurdity, or disharmony.

Thus, in *Barnard* v. *Gorman*,[25] cited by Cross[26] as an example of the application of an extended meaning in order to avoid an absurdity, the House of Lords held that the word "offender" included a person suspected on reasonable grounds to have committed an offence. To confine the word to a person who has in fact offended would, as stated

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[21] *Supra*, footnote 2, at p. 143.

[22] Statutory Interpretation (1976), pp. 82 and 169.

[23] *Op. cit.*, *ibid.*, p. 81.

[24] *Ibid.*

[25] [1941] A.C. 378.

[26] *Op. cit.*, footnote 22, p. 77.

by Lord Romer,[27] in an action for damages for wrongful arrest, "render the provision nonsensical". That would indeed be an absurdity, but I would regard it as an objective absurdity; it is there for all to see and does not rest on any one's sense of values.

But the case could be decided the same way without mentioning absurdity. The courts must, of course, lean against a construction that will reduce a statute to nonsense. The popular meaning of "offender" goes beyond the technical meaning of "person convicted". Thus, if I am standing at a street corner with a policeman and a car drives through an intersection against a red light, I might ask him "Did you see that offender?" The policeman surely would not say "you must not call the driver an offender; you can do that only after he has been convicted". Here we have two meanings; a technical legal meaning that would nullify the statute and a popular meaning that gives it effect. The choice is obvious.

Obviously a word or group of words may have one "grammatical and ordinary sense" out of context, and a different one in context. And if the meaning in context is chosen, is that not then the "literal" meaning?

Another case cited by Cross as an example of a construction to avoid an absurdity is *Wiltshire* v. *Barrett*.[28] That case dealt with an impaired driving section in a statute and provided that a police constable might arrest without warrant "a person committing an offence" under that section. A peace officer, having reasonable grounds for believing that a driver was through drink unfit to drive, stopped and arrested him. The driver was not charged, and he then brought an action claiming damages for assault. The Court of Appeal held that the arrest was lawful because "a person committing an offence" must be read as a person "apparently committing an offence". To confine the section to the arrest of a person while committing an offence makes nonsense of the statute. A peace officer obviously cannot take hold of a driver while he is driving, and once he stops, the words of the statute could be construed to mean that he ceases committing an offence and could not be arrested. That need not be called an absurdity. I would say that such a construction makes nonsense of the statute and should be avoided. But if it is called an "absurdity" I would regard it as an objective absurdity, one that would entitle a court to read "committing" as meaning "apparently committing" in order to give effect to Parliament's obvious intention.[29]

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[27] *Supra*, footnote 25, at p. 396.

[28] [1966] 1 Q.B. 312.

[29] See *e.g. Salmon* v. *Duncombe*, *supra*, footnote 20, where words were ignored and the grammar interpolated to give effect to Parliament's clear intention. Also

These cases and many others like the ones cited in footnotes 8, 9 and 10 were not resolved by the application of Lord Wensleydale's "unless" clause.

D.C. Pearce in his book on *Statutory Interpretation in Australia*[30] cites Lord Wensleydale's "unless" clause and says that it applies only where the legislature made a mistake. He says:[31] "As might be expected, the 'golden rule' is not often applicable to legislation as legislatures seldom prepare 'absurd' legislation. However, the occasional mistake slips through and the courts will then, somewhat cautiously, adopt the approach implicit in the rule." When I first read this, I thought he was taking too narrow a view of Lord Wensleydale's words, but now I think he was right. I believe I had the same idea in my text, but did not express it so clearly. I did say that:[32] "The golden rule qualification is simply that if by reading the words in their grammatical and ordinary sense there is disharmony (within the statute or within statutes *in pari materia*) then something must be done to produce harmony." I then gave examples of how disharmony is avoided—by qualification, by adopting a less grammatical construction, by alteration of words, by omission of words, by exception, by reduction in scope. I am now convinced that these methods are not the application of Lord Wensleydale's "unless" clause, because the process is finding the literal meaning rather than departing from it, except in those cases, as Pearce says, where a mistake is corrected. I did say[33] that although the courts have departed from the strict grammatical meaning on the ground of inconsistency, cases where they profess to do so on the ground of absurdity are rare; and in those cases an examination of the facts, the statute, the issues and the decision will usually show that the absurdity was an inconsistency, repugnance, illogicality or incongruity within the statute or within statutes *in pari materia*. Instead of "strict" grammatical construction I should have said *prima facie* or "more obvious". I also said[34] that if the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony and a less grammatical or less ordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning. I should have said something like "the first blush" grammatical and ordinary

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Caledonian Railway Company v. *North British Railway*, *supra*, footnote 8, where "clear" words in the statute were modified in order to conform to the declared object of the Act.

[30] (1974).

[31] *Ibid.*, p. 15.

[32] *Op. cit.*, footnote 4, p. 48.

[33] *Ibid.*, p. 46.

[34] *Ibid.*, p. 81.

sense, because the "less" grammatical and "less" ordinary meaning is the meaning within this statute, and is not a departure from some other "meaning"; it is only a departure from another, perhaps a more obvious meaning, but the meaning as found is the "grammatical and ordinary" or the "literal" meaning of the statute. After all, "literal" means "not figurative or metaphorical". Statutes are not written in figures of speech or metaphors.